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No. 15-274

In the Supreme Court of the United States

WHOLE WOMAN'S HEALTH, *ET AL.*

Petitioners,

v.

JOHN HELLERSTEDT, M.D., COMMISSIONER OF THE TEXAS DEP'T OF STATE HEALTH SERVICES, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF TEXAS EAGLE FORUM, TEXAS RIGHT TO LIFE, AND EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND

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QUESTIONS PRESENTED

Like other States, Texas responded to the Kermit Gosnell scandal by enacting laws to improve the standard of care for abortion patients. The Legislature heard testimony about the health benefits of requiring doctors to have admitting privileges at nearby hospitals and clinics to meet ambulatory-surgical-center standards. Evidence to the same effect was admitted at trial. In- deed, this Court upheld an ambulatory-surgical-center law for second-trimester abortions in *Simopoulos v. Virginia*, 462 U.S. 506 (1983), and the National Abortion Federation previously recommended that abortion doctors have local admitting privileges.

The Fifth Circuit upheld Texas's laws facially. Under its judgment, an abortion clinic will remain open in each area where one will close, meaning that over 90% of Texas women of reproductive age will live within 150 miles of an open abortion clinic. As the Fifth Circuit noted, petitioners advanced no proof that those clinics will lack capacity to meet abortion demand.

The questions presented are:

1.a. Whether the Court should overturn *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), and *Gonzales v. Carhart*, 550 U.S. 124 (2007), by allowing courts to override legislative determinations about disputed medical evidence, rather than adhering to the doctrine that an abortion regulation is valid if it has a rational basis and does not impose a substantial obstacle to abortion access.

1.b. Whether the challenged laws are invalid facially or as-applied to an abortion clinic in El Paso.

2. Whether res judicata bars this facial challenge.

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INTEREST OF *AMICI CURIAE*

Amici curiae Texas Eagle Forum, Texas Right to Life, and Eagle Forum Education & Legal Defense Fund (collectively, "*Amici*") have supported Texas at every stage of these proceedings to defend the law challenged here.[1] For the following reasons, each *amicus* has direct and vital interests in the issues before this Court.

Amicus Texas Eagle Forum is a nonprofit organization founded in 1975, incorporated in 1989,

[1] *Amici* file this brief with the consent of all parties; *amici* have lodged the respondents' written consent with the Clerk, and the petitioners have lodged their blanket consent with the Clerk. Pursuant to Rule 37.6, counsel for *Amici* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity – other than *amici*, their members, and their counsel – contributed monetarily to the preparation or submission of this brief.

and headquartered in Dallas, Texas. Texas Eagle Forum's mission is to enable conservative and pro-family Texans to participate in the process of self-government and public policy-making so that America will continue to be a land of individual liberty, respect for family integrity, public and private virtue, and private enterprise.

Amicus Texas Right to Life is a nonprofit organization headquartered in Houston, Texas. Texas Right to Life is a nonsectarian and nonpartisan organization that seeks to articulate and to protect the right to life of defenseless human beings, born and unborn, through legal, peaceful, and prayerful means.

Amicus Eagle Forum Education & Legal Defense Fund ("EFELDF") is a nonprofit corporation founded in 1981 and headquartered in Saint Louis, Missouri. For more than thirty years, EFELDF has defended federalism and supported states' autonomy from federal intrusion in areas – like public health – that are of traditionally local concern. Further, EFELDF has a longstanding interest in protecting unborn life and in adherence to the Constitution as written. Finally, EFELDF consistently has argued for judicial restraint under both Article III and separation-of-powers principles.

STATEMENT OF THE CASE

Several abortion clinics and doctors (collectively, "Providers") have sued officers of Texas' Executive Branch (collectively, "Texas") to enjoin two new requirements that Texas House Bill 2, Act of July 18, 2013, 83rd Leg., 2nd C.S., ch. 1, Tex. Gen. Laws ("HB2"), places on abortion providers: (a) requiring abortion doctors to have admitting privileges at a local

hospital; and (b) requiring abortion facilities to meet the structural requirements applicable to ambulatory surgical centers ("ASCs").

Constitutional Background

"Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens," which "are primarily, and historically, ... matters of local concern." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (interior quotations and alterations omitted). For their part, the federal Executive and Congress lack a corresponding police power: "we always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power." *U.S. v. Morrison*, 529 U.S. 598, 618-19 (2000).

Notwithstanding this state dominance on public-health issues, this Court has found in the Fourteenth Amendment a woman's right to abort a non-viable fetus, first as an implicit right to privacy and subsequently as a substantive due-process right to liberty. *Roe v. Wade*, 410 U.S. 113 (1974); *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833 (1992). Under *Casey*, 505 U.S. at 878, States retain the right to regulate abortions in the interest of maternal health and in the interest of the unborn child, provided that they do not impose an undue burden on a pregnant woman's *Roe-Casey* rights. But the Constitution does "not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community," *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007), because federal

courts are not "'the country's *ex officio* medical board.'" *Id.* at 164 (*quoting Webster v. Reproductive Health Serv.*, 492 U.S. 490, 518-19 (1989) (plurality opinion)). In particular, "legislatures [have] wide discretion to pass legislation in areas where there is medical ... uncertainty," which "provides a sufficient basis to conclude in [a] facial attack that the Act *does not* impose an undue burden." *Gonzales*, 550 U.S. at 164 (emphasis added). With respect to maternal health, States may require "medically competent personnel under conditions insuring maximum safety for the woman." *Connecticut v. Menillo*, 423 U.S. 9, 10-11 (1975); *accord Mazurek v. Armstrong*, 520 U.S. 968, 971 (1997); *Roe*, 410 U.S. at 150.

The merits questions presented here involve the contours of *Roe-Casey* abortion rights vis-à-vis states' rights under *Casey* to regulate maternal health and safety, as well as to protect the life of the infant. *Casey* promulgated the following test:

> (a) To protect the central right recognized by *Roe* ... while at the same time accommodating the State's profound interest in potential life, we will employ the undue burden analysis as explained in this opinion. An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.
>
> (b) We reject the rigid trimester framework of [*Roe*]. To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to

> ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.
>
> (c) As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion. *Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.*
>
> (d) Our adoption of the undue burden analysis does not disturb the central holding of *Roe* ..., and we reaffirm that holding. Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.
>
> (e) We also reaffirm *Roe*'s holding that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."

Casey, 505 U.S. at 878-79 (citations omitted, emphasis added). Significantly, only the maternal-health prong in clause (c) asks whether the state regulation is "unnecessary."

Under Article III, federal courts cannot issue advisory opinions and instead must focus on cases or controversies presented by affected parties. *Muskrat v. U.S.*, 219 U.S. 346, 356-57 (1911). Standing doctrine measures the necessary effect on plaintiffs under a tripartite test: cognizable injury to the plaintiffs, causation by the challenged conduct, and redressable by a court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). These limitations "assume[] particular importance in ensuring that the Federal Judiciary respects the proper – and properly limited – role of the courts in a democratic society." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (citations and internal quotations omitted). For a plaintiff to assert the rights of absent third parties, *jus tertii* (third-party) standing prudentially requires that the plaintiff have its own constitutional standing and a "close" relationship with absent third parties and that a sufficient "hindrance" keeps the absent third parties from protecting their own interests. *Kowalski v. Tesmer*, 543 U.S. 125, 128-30 (2004) (*citing Powers v. Ohio*, 499 U.S. 400, 411 (1991)). Further, because "standing is not dispensed in gross," *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996), plaintiffs must establish standing for each form of relief that they request.

Statutory Background

As relevant here, HB2 provides three protections of maternal health: (1) it limits the performance of "medication abortions" (*i.e.*, drug-induced abortions) to those performed in conformance with the regimen approved by the federal Food & Drug Administration, TEX. HEALTH & SAFETY CODE §171.063(a)(1)-(2) (HB2

§3); (2) it requires abortion doctors to have admitting privileges at a hospital within thirty miles of the abortion clinic, *id.* §171.0031(a)(1) (HB2 §2); and (3) it requires abortion clinics to meet ASC standards, *id.* §245.010(a) (HB2 §4). Significantly, Texas enacted HB2 in the wake of the Gosnell prosecution and the accompanying revelations about the abortion industry not only for murdering live-born, viable infants but also for endangering and even killing abortion patients. *See In re County Investigating Grand Jury XXIII*, Misc. No. 9901-2008 (Pa. C.P Phila. filed Jan. 14, 2011) (hereinafter, "Gosnell Grand Jury Report").

HB2's supporters specifically identified HB2 as helping to prevent Gosnell-like instances of substandard care:

> Higher standards could prevent the occurrence of a situation in Texas like the one recently exposed in Philadelphia, in which Dr. Kermit Gosnell was convicted of murder after killing babies who were born alive. A patient also died at that substandard clinic.

House Research Organization, Texas House of Representatives, Bill Analysis, HB 2, at 10 (July 9, 2013) (summary of supporters' arguments for HB2) (hereinafter, "House Report"). HB2's supporters argued that the "The bill would force doctors who did not have hospital admitting privileges to upgrade their standards or stop performing abortions." *Id.* at 10-11.

Shortly after Dr. Gosnell's conviction, charges surfaced that a Houston-based abortion provider was running a similar operation, prompting Texas's then-Lieutenant Governor to call for an investigation. Erik

Eckholm, *National Briefing: Southwest: Texas: Investigation of Abortion Doctor*, N.Y. TIMES, May 15, 2013, at A15. Thus, the Gosnell prosecution was not a mere crime story from half a continent away, but something that drew the Texas Legislature's focus because it could happen – and quite possibly already was happening – in Texas. Becca Aaronson, *Dewhurst Urges Action on Abortion Bills*, THE TEXAS TRIB., May 21, 2013.[2]

When adding "[l]egislation relating to the regulation of abortion procedures, providers, and facilities" to the agenda for the called legislative session on June 11, 2013, Office of the Governor, State of Texas, Message, at 1 (June 11, 2013), then-Governor Perry issued a statement noting that "'[t]he horrors of the national late-term abortion industry are continuing to come to light, one atrocity at a time," noting that "some of those same atrocities happen in our own state.'" Matthew Waller, *Texas Legislature: Abortion regulations join session*, SAN ANGELO STANDARD-TIMES, June 11, 2013.[3] Although a grand jury subsequently declined to indict the Houston provider, Brian Rogers, *Houston doctor cleared in late-term abortion scandal*, HOUSTON CHRON, Dec. 20, 2013,[4] the absence of criminal culpability would be a

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[2] http://www.texastribune.org/2013/05/21/dewhurst-urges-action-abortion-bills/ (last visited Feb. 3, 2016).

[3] http://www.gosanangelo.com/news/texas-legislature-abortion-regulations-join-session-ep-438611632-355551901.html (last visited Feb. 3, 2016).

[4] http://www.chron.com/news/houston-texas/houston/article/Houston-doctor-cleared-in-late-term-abortion-5082181.php (last visited Feb. 3, 2016).

low bar for the Legislature to adopt for public-health regulation. Moreover, although the Houston grand jury acted after the Legislature had passed HB2, the Legislature may have found that low prosecution rates were the result of the politicization of the issue and the lack of clear and easily enforceable standards.

Factual Background

Amici adopts the fact as stated in Respondents' brief. *See* Texas Br. at 1-14. In addition, as outlined here, *Amici* also rely on the Gosnell Grand Jury Report and other legislative facts on which the Legislature plausibly may have relied to enact HB2.

Even at the low complication rates claimed by the abortion industry, the high number of abortions in Texas results in numerous cases annually where women are hospitalized due to complications. *See* Texas Dep't of State Health Serv., 2012 Induced Terminations of Pregnancy (June 25, 2014) (68,298 induced abortions in Texas in 2012). Under the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. §1395dd ("EMTALA"), Texas hospitals must treat people in emergency rooms, regardless of their ability to pay for their care. Thus, HB2 plainly addresses not only a public-health problem borne by Texas women seeking abortions, but also an expense imposed on the Texas public-health system by abortion providers who shunt their hard cases onto the public via EMTALA.

Under the heading "Who Could Have Prevented All this Death and Damage?," the Gosnell grand jury found that Pennsylvania's failure to regulate abortion providers as ambulatory surgical centers contributed to the death of at least one patient:

> Had [the Pennsylvania Department of Health ("DOH")] treated the clinic as the ambulatory surgical facility it was, DOH inspectors would have assured that the staff were all licensed, that the facility was clean and sanitary, that anesthesia protocols were followed, and that the building was properly equipped and could, at least, accommodate stretchers. Failure to comply with these standards would have given cause for DOH to revoke the facility's license to operate.

Gosnell Grand Jury Report, at 215; *see also id.* at 21, 45, 77-78, 129, 139-41, 155.

Further, a variant of "agency capture[5]" and "political correctness" infects the administrative regulation of the abortion industry, so that – for example – "[e]ven nail salons in Pennsylvania are monitored more closely for client safety" than abortion clinics. Gosnell Grand Jury Report, at 137. In order to avoid placing limits on abortion-access rights, regulators do not adequately enforce public-health rules:

> [Pennsylvania Department of Health Senior Counsel Kenneth] Brody confirmed some of

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[5] "'Agency capture' ... is the undesirable scenario where the regulated industry gains influence over the regulators, and the regulators end up serving the interests of the industry, rather than the general public." *Wood v. GMC*, 865 F.2d 395, 418 (1st Cir. 1988) (*citing* John Shepard Wiley Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 724-26 (1986); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1684-87, 1713-15 (1975)).

> what [Janice] Staloski [the Director of the Pennsylvania Department of Health unit responsible for overseeing abortion clinics] told the Grand Jury. He described a meeting of high-level government officials in 1999 at which a decision was made not to accept a recommendation to reinstitute regular inspections of abortion clinics. The reasoning, as Brody recalled, was: "there was a concern that if they did routine inspections, that they may find a lot of these facilities didn't meet [the standards for getting patients out by stretcher or wheelchair in an emergency], and then there would be less abortion facilities, less access to women to have an abortion."

Gosnell Grand Jury Report, at 147 (fourth alteration in original). The same phenomenon also appears in the medical literature:

> Political considerations have impeded research and reporting about the complications of legal abortions. The highly significant discrepancies in complications reported in European and Oceanic [j]ournals compared with North American journals could signal underreporting bias in North America.

Jane M. Orient, M.D., *Sapira's Art and Science of Bedside Diagnosis,* ch. 3, p. 62 (Lippincott, Williams & Wilkins, 4th ed. 2009) (citations omitted); *see also* Gosnell Grand Jury Report, at 137-207 (non-enforcement by state and local regulators). In short, a legislature could rationally conclude that the abortion industry is an unsuitable candidate either for self-

regulation or for weak and discretionary regulatory oversight.[6]

Indeed, quite to the contrary, the abortion industry throws great public-relations and advocacy efforts into fighting disclosure of correlated health effects that other medical disciplines readily would disclose. *See, e.g., Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 686 F.3d 889, 898 (8th Cir. 2012) (*en banc*) (abortion industry opposed South Dakota's requiring disclosure of abortion's correlation with suicide ideation); *K.P. v. LeBlanc*, 729 F.3d 427 (5th Cir. 2013) (abortion industry opposed Louisiana's tying limitation on liability to only those medical risks expressly disclosed in an informed-consent waiver). For all these reasons, legislators had a plausible factual basis to conclude that the public health required that the abortion industry face more stringent regulation.[7]

SUMMARY OF ARGUMENT

Although Providers lack third-party standing to assert their future patients' *Roe-Casey* rights, Section III, *infra*, the *Casey* undue-burden analysis would not

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[6] Agency capture and the lax regulatory enforcement shown in the Gosnell Grand Jury Report would give legislators pause to equate a regulator's inability to "identify a single instance in which a physician providing abortions engaged in conduct that posed a threat to public health or welfare" in 13 years, Providers Br. at 42, with safety; the same could result from enforcement that was either too lax or regulations that were too discretionary.

[7] As Texas explains, HB2 simply imposes the statewide ASC requirements on abortion clinics. *See* Texas Br. at 5. Thus, rather than imposing *heightened scrutiny* on the abortion industry vis-à-vis other types of medical practices, HB2 merely applied the *same* ASC standards that apply statewide.

apply here, even if Providers could assert those rights. With regard to regulations that protect maternal health – as distinct from those that advance a state's interest in the infant's life – the *Casey* undue-burden analysis applies only if the regulation qualifies as "unnecessary" under rational-basis review. *See* Sections I.B-I.C. This result is inherent in Casey itself and flows from the fact that states have historical police powers to protect public health, whereas the federal government does not. *See* Section I.A, *infra*. As a result, *Casey* does not call on the federal judiciary to conduct the balancing analysis pressed by Providers -- and arguably suggested linguistically by the phrase "undue burden." *See* Section I.D, *infra*. Instead, undue burden is simply a *Casey* "shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." 505 U.S. at 877. For maternal-health regulations, *Casey* adds a second element to a plaintiff's case: whether the state's regulation is unnecessary.

Amici respectfully submit that only maternal-health abortion regulations include a "non-necessity" inquiry because only such regulations protect the holders of the *Roe-Casey* right to an abortion, which justifies placing that inquiry *before* determining whether the regulation presents an undue burden.[8] Were it otherwise, states would be hard-processed to prohibit even "back-alley" abortions, which plainly is not the law. *Menillo*, 423 U.S. at 10-11. As *Menillo* recognized contemporaneously with *Roe*, states may

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[8] *Amici* emphatically do not support lesser protections for infants. *Amici* are merely describing this Court's holdings.

require that "abortion [be] performed by *medically competent personnel under conditions insuring maximum safety* for the woman." *Id.* (emphasis added); *accord Mazurek*, 520 U.S. at 971.

To prevail under the rational-basis test, Providers must do far more than win a battle of rival experts in a courtroom: they must negate "the *theoretical* connection" between HB2 and Texas's public-safety goals. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463-64 (1981) (emphasis in original). *See* Section II.A, *infra*. Moreover, even if Providers had a supportable claim against the impact of some aspect of HB2 in some geographic part of Texas, that would not support either a facial challenge generally, *see* Section II.B, *infra*, or statewide relief under HB2's severability clause. *See* Section II.E, *infra*. In any event, Providers have not established a violation of *Casey* either for ASC standards or for admitting-privilege requirements. In neither case did Providers disprove the theoretical connection between HB2 and protecting public health. *See* Sections II.C (ASC standards), II.D (admitting privileges), *infra*.

ARGUMENT

I. THIS COURT SHOULD CONFIRM THAT THE *CASEY* INQUIRY FOR MATERNAL-HEALTH REGULATIONS APPLIES THE UNDUE-BURDEN TEST ONLY TO LAWS THAT ARE "UNNECESSARY" UNDER THE RATIONAL-BASIS TEST.

In their narrow reading of *Casey*, Providers would restrict states' latitude to protect the health and safety of women who seek abortions, which conflicts with federalism and – if allowed – would establish an

unsound regulatory policy. Under that reading, *Casey* would have weakened Texas's police power to protect its citizens in an area of traditional state and local concern (namely, public health) where the federal government lacks a corresponding police power. That would leave only the judiciary and abortion providers to protect the public from abortion providers, which is to say it would leave no one who is both qualified *and* disinterested to protect public health. Respectfully, *Amici* submit that that is not – and cannot be – the law.

The parties dispute not only the significance of the word "unnecessary" in *Casey* but also the standard for courts to determine non-necessity:

> *Unnecessary* health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.

Casey, 505 U.S. at 878 (emphasis added); *compare* Texas Br. at 23-24 *with* Providers Br. at 34, 45. *Amici* respectfully submit that an analysis of the alleged non-necessity for state regulation is an independent and mandatory element of Provider's *prima facie* case and that courts review the issue under the rational-basis test.

A. This Court must read the Fourteenth Amendment consistent with the Constitution's Federalist structure to allow state regulation of public health.

As indicated, "[t]hroughout our history the several States have exercised their police powers to protect the health and safety of their citizens," which "are 'primarily, and historically, ... matter[s] of local

concern.'" *Medtronic*, 518 U.S. at 475 (internal quotations omitted, second and third alterations in *Medtronic*). By contrast, the federal government lacks a corresponding police power to take up the slack: "we always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power." *Morrison*, 529 U.S. at 618-19. Thus, if neither state nor federal government can regulate the abortion industry's excesses, that would leave only the judiciary and the abortion industry itself.

The judiciary, of course, is ill-suited by training to determine or second-guess what medical procedures are safe or necessary. *Gonzales*, 550 U.S. at 163-64; *cf. Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 766 (2007) (federal courts "are not social engineers") (Thomas, J., concurring). Indeed, judges are even less qualified to practice medicine than they are to practice social engineering. Because the judiciary is not a credible regulator, Providers' narrow reading of states' flexibility under *Casey* would make abortion a self-regulated industry.

While some might argue that the public and the states should be able to trust abortion providers, that approach would be extremely naïve. Perhaps because of the politicization of this issue in the United States – caused in great part by the unprecedented *Roe* decision – abortion providers appear to regard themselves more as civil-rights warriors than as medical providers. Indeed, many abortion providers simply cannot disclose anything negative about their abortion mission. See Orient, *Bedside Diagnosis*, ch.

3, p. 62 (quoted *supra*). While a federal court likely could not hold Pennsylvania liable for *under-regulating* abortion in the name of expanded abortion access, a federal court has even less business faulting a state for exercising its police power to protect its citizens in an area of predominant state authority. For these reasons, the abortion industry's lack of transparency calls out for *heightened regulation*, vis-à-vis other, less-politicized medical practices. Claims that states target the abortion industry for *unwarranted* scrutiny have it precisely backwards.

Texas has regulated an industry that cuts corners and hides information by requiring that this industry integrate itself – through its physicians' admitting privileges – into the larger medical community. Texas thus has acted appropriately in seeking to increase the standard of care and to minimize unnecessary death and injury. Put another way, Texas has required "medically competent personnel under conditions insuring maximum safety for the woman." *Menillo*, 423 U.S. at 10-11; *Mazurek*, 520 U.S. at 971; *Roe*, 410 U.S. at 150. *Casey* does not pose an obstacle to Texas's doing so.

B. *Casey* read the Fourteenth Amendment consistent with the Constitution's Federalist structure to allow state regulation of public health.

As *Amici* read *Casey*, this Court already has read the Fourteenth Amendment to preserve the historic police power of states to regulate public health with a framework that balances competing individual and state interests. Significantly, *Roe* concerned states' ability to *prohibit* abortions in the interest of the

unborn child and the state's interest in that new life. By contrast, this litigation concerns the states' ability to *regulate* abortions in the interest of *pregnant women* who contemplate and receive abortions. On the application of the police power to protecting the *pregnant woman's* health, this Court never has ruled that the right to a particular abortion method trumps the states' interest in public health. As *Amici* understand *Casey*, the undue-burden test does not arise for "necessary" regulation of abortion procedures to protect women seeking an abortion. *See Casey*, 505 U.S. at 878. Only *unnecessary* regulations of women's health trigger further inquiry under *Casey*.

Specifically, following *Roe*, *Menillo*, and *Mazurek*, *Casey* allows that states "may enact regulations to further the health or safety of a woman seeking an abortion," "[a]s with any medical procedure." *Casey*, 505 U.S. at 878. The only prohibition in the *Casey* prong applicable to pregnant women is that "*[u]nnecessary* health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." *Id.* (emphasis added). To unpack this language into its constituent parts, a *Casey* violation for state regulations protecting maternal health requires that the plaintiff establish both of two elements:

- A maternal-health regulation is *unnecessary;* and
- The regulation has either the purpose or effect of presenting a *substantial obstacle.*

Id. As indicated, the unnecessary prong is unique to the maternal-health context, whereas the substantial-obstacle prong is *Casey*'s undue-burden test. *Casey*,

505 U.S. at 877 ("an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus"). If the regulation is necessary (*i.e.*, not "unnecessary"), that ends the analysis: there is no *Casey-Roe* violation. Put another way, the undue-burden analysis does not even arise if the regulation is not unnecessary.

C. For state regulations of maternal health, courts must analyze necessity under the rational-basis test.

Because neither *Roe* nor *Casey* involved maternal-health regulations, neither case presented an opportunity for this Court to hold squarely how the Court would analyze such regulations, as distinct from the infant-based regulations at issue in *Roe* and *Casey*. But this Court has made clear that federal courts are not "the country's *ex officio* medical board." *Gonzales*, 550 U.S. at 164 (interior quotation omitted). In particular, "legislatures [have] wide discretion to pass legislation in areas where there is medical ... uncertainty," which "provides a sufficient basis to conclude in [a] facial attack that the Act *does not* impose an undue burden." *Id.* (emphasis added). Significantly, the Constitution does "not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community." *Gonzales*, 550 U.S. at 163. To the contrary, when a state "law ... serves a valid purpose" (as HB2 does) and "has the incidental effect of making it more difficult or more expensive to procure an abortion," the added difficulty or expense "cannot be enough to

invalidate it." *Casey*, 505 U.S. at 874. These holdings from *Gonzales* and *Casey* apply even more so here.[9]

D. *Casey* does not impose a balancing test.

While the phrase "undue burden" perhaps begs the question, linguistically, about which burdens are "due" and which are "undue," that inquiry is neither relevant here nor what this Court meant by adopting the phrase in *Casey*.

First, as Sections I.A-I.C, *supra*, make clear, the undue-burden test does not even apply to maternal-health regulations if those regulations are necessary under *Casey*. *See also Harris v. McRae*, 448 U.S. 297, 325-26 (1980) ("[i]t is not the mission of this Court or any other to decide whether the balance of competing interests ... is wise social policy"); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487 (1955) ("it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement"). Accordingly, the wisdom of HB2 does not come up under the *Casey* analysis.

Second, as *Casey* explained, "an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Casey*, 505 U.S. at 877. The question is whether "a substantial obstacle" exists, not whether that obstacle serves a worthy purpose. Perhaps "impermissible burden" would have been a more accurate shorthand, linguistically, but the clear

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[9] Like *Roe* and *Casey*, *Gonzales* did not review a maternal-health regulation, and so its holding applies to the undue-burden analysis generally.

implication is that the mere phrase "undue" does not itself invite any speculation on which burdens are due or undue.[10]

II. HB2 DOES NOT VIOLATE THE CONSTITUTION.

Once this Court settles the standard-of-review issue identified in Section I, *supra*, the rejection of the District Court's specific findings and Providers' claims clearly follow. Significantly, the entire Texas abortion industry does not challenge HB2 in this litigation. If some elements of the abortion industry can meet HB2's standards, but these challengers cannot, Texas women deserve HB2's safety protections from the non-challenging elements of that industry. Regulated industries do not and cannot have a heckler's – or slacker's – veto over reasonable state regulation, allowing even the laxest operators to invalidate regulations by threatening to close shop and thereby to underserve the market for their services.

A. The rational-basis test does not invite courtroom fact-finding to invalidate plausible safety regulations.

Before applying the rational-basis test to HB2, *Amici* first emphasize the test's deferential nature.

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[10] In finding an undue burden, the District Court also considered any burdens posed by HB2 cumulatively with numerous "practical concerns" such as poverty that are unrelated to HB2. Pet. App. 142a. Simply put, the government need not lower its standards or otherwise subsidize poverty with respect to abortion rights: "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation." *McRae*, 448 U.S. at 316.

Under the rational-basis test, "[i]t is enough ... that it *might be* thought that the particular legislative measure was a rational way to correct it." *Lee Optical*, 348 U.S. at 488 (emphasis added). Here, virtually every business day,[11] Texas women flow into the Texas hospital system due to abortion-related complications, many of them life-threatening. To overturn Texas's legislative response under the rational-basis test, Providers must do more than marshal "impressive supporting evidence ... [on] the probable consequences of the [statute]" vis-à-vis the legislative purpose; they instead must negate "the *theoretical* connection" between the two. *Clover Leaf Creamery*, 449 U.S. at 463-64 (emphasis in original); *F.C.C. v. Beach Comm., Inc.*, 508 U.S. 307, 315 (1993) ("legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data"). Even if it were possible to "negate" that "*theoretical* connection" between HB2's provisions and safety – and *Amici* doubt that it is – Providers certainly have not made the required showing.

Unlike strict-scrutiny, the availability of less-restrictive alternatives does not undermine measures because, with the rational-basis test, it is "irrelevant ... that other alternatives might achieve approximately the same results." *Vance v. Bradley*,

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[11] With 77,592 induced abortions in Texas in the most recent year for which data are available, *see* Texas Dep't of State Health Serv., 2012 Induced Terminations of Pregnancy (June 25, 2014), hundreds of Texas women are hospitalized for abortion-related complications annually, even at the low rates of complications that Providers claim.

440 U.S. 93, 103 n.20 (1979); *Dallas v. Stanglin*, 490 U.S. 19, 26-28 (1989); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 316-17 (1976).

B. HB2's geographically dispersed impacts do not support a facial challenge with a statewide remedy.

This litigation once again presents the question of how pervasively a law must violate an applicable restriction before a court will invalidate the law *on its face*, as opposed to merely enjoining any unlawful *applications* of the law, as well as the proper standard for finding facial invalidity. Two precedents – the *Salerno* no-set-of-circumstances test and the *Casey* large-fraction test – guide this inquiry, *U.S. v. Salerno*, 481 U.S. 739, 745 (1987); *Casey*, 505 U.S. at 895, but the District Court adopted its own "significant-number" test. Pet. App. 139a-141a. While this Court should reject the District Court's new, weaker standard, it seems unnecessary to resolve the *Salerno-Casey* dichotomy because HB2 passes both tests.

First, the fraction of affected women – which the parties dispute – is *no more* than one-sixth (*i.e.*, the women of reproductive age living more than 150 miles from an abortion clinic, divided by the total women of reproductive age). *Gonzales*, 550 U.S. at 167-68 ("the statute here applies to all instances in which the doctor proposes to use the prohibited procedure, not merely those in which the woman suffers from medical complications"). As Texas explains, however, not all of the women living more than 150 miles from an abortion clinic can attribute that status to HB2 (*e.g.*, some lived that far away before HB2's enactment

and some closures are not the result of HB2), and the one-sixth figure fails to count access to an abortion clinic on the New Mexico side of the border but nonetheless in the El Paso metropolitan area.[12] *See* Texas Br. at 45-46 & n.19. Thus, the actual number of women affected by HB2 is considerably less than

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[12] Providers' opposition to counting the New Mexico facility is doubly flawed. *See* Providers Br. at 52-53. First, the failure of *Casey* and other decisions to consider out-of-state clinics is not precedential: "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper Indus., Inc. v. Aviall Serv., Inc.*, 543 U.S. 157, 170 (2004) (interior quotations omitted). Quite simply, "cases cannot be read as foreclosing an argument that they never dealt with." *Waters v. Churchill*, 511 U.S. 661, 678 (1994). Second, resort to *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), and the *ancien regime* of separate-but-equal education is wholly misplaced. The then-perceived legality of "separate but equal" "rest[ed] wholly upon the equality of the privileges which the laws give to the separated groups *within the State*." *Gaines*, 305 U.S. at 349 (emphasis added). In that context, the "question [t]here [was] *not of a duty of the State to supply legal training*, or of the quality of the training which it [did] supply," but only the state's "duty when it provide[d] such training to furnish it to the residents of the State upon the basis of an equality of right." *Id.* (emphasis added). Even under today's equal-protection analysis, courts evaluate restrictions on attending School A independently from whether alternate in-state schools (*e.g.*, School B) exist. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 729 (1982). Fragments from equal-protection cases – where the state may *terminate* its services equally as an alternative to providing them equally, *Heckler v. Mathews*, 465 U.S. 728, 740 (1984) – cannot credibly be imported, out of context, to abortion cases, where Providers claim that states cannot terminate access.

seven percent (*i.e.*, less than *one fourteenth* of the population).[13]

Second, while there admittedly is some complexity as to the correct standard to apply to facial challenges, the result is the same, whichever test this Court uses. Specifically, while it remains unclear whether courts should use the *Salerno* no-set-of-circumstances test or the *Casey* large-fraction test, it is unnecessary to settle that debate because Providers fail under either test. *Gonzales*, 550 U.S. at 167-68 (declining to resolve debate). Assuming *arguendo* that the large-fraction test is valid, that test merely relaxes the *Salerno* test. Whereas *Salerno* required 100% of the applications to violate the statutory or constitutional requirement for facial challenges, the large-fraction test relaxes the requirement to allow facial challenges against laws with *some* valid applications, provided that a large fraction of cases violate the law. Viewed that way, it would be remarkable to consider one-sixth – and much less one-fourteenth – as a large fraction of the alternative *Salerno* requirement (namely, six-sixths or fourteen-fourteenths).

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[13] While the large-fraction issue first arose in *Casey* in a situation that involved married women (*i.e.*, a subset of the total population), *Casey*, 505 U.S. at 894, here we have a law that applies to every abortion facility *statewide*. *Gonzales*, 550 U.S. at 167-68. As such, the proper denominator for a facial challenge on HB2's impacts is the statewide population of women of reproductive age.

C. The ASC requirements do not violate the Constitution.

The ASC requirements are intended to save lives, and this Court should not second-guess Texas's exercise of its police power on this public-health issue. *See* Sections I.A-I.B, *supra*. Significantly, the Gosnell grand jury identified regulating abortion clinics as ASCs as one action that could have saved lives. Gosnell Grand Jury Report, at 215; *see also id.* at 21, 45, 77-78, 129, 139-41, 155. To prevail, Providers need to negate the *theoretical connection* between HB2 and Texas's objective, *Clover Leaf Creamery*, 449 U.S. at 463-64, which Providers have not come even close to meeting. Insofar as federal courts are not "the country's *ex officio* medical board," *Gonzales*, 550 U.S. at 164 (interior quotations omitted), this Court should confirm that here.

To the extent that an undue-burden analysis applied, travel distances up to 150 miles would satisfy that test. *Casey*, 505 U.S. at 887 ("on the record before us, and in the context of this facial challenge, we are not convinced that the 24-hour waiting period constitutes an undue burden"); *Planned Parenthood of Se. Pa. v. Casey*, 744 F. Supp. 1323, 1352 (E.D. Pa. 1990) (women must "travel for at least one hour, and sometimes longer than three hours, to obtain an abortion from the nearest provider"), *aff'd in part, rev'd in part*, 947 F.2d 682 (3d Cir. 1991), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992). Providers perhaps are correct that 150 miles is not a bright-line rule, but only because distances greater than 150 miles also would not pose an undue burden. Thus, the 150-mile

test provides a safe-harbor form of analysis, not an outer limit.

Apparently reasoning that a surgical center is not required to take medication, the District Court premised its invalidation of the ASC requirements as applied to medication abortions on a balancing test. Pet. App. 150a. As explained in Section I.D, *supra*, however, the undue-burden test does not allow that balancing. The public-health concerns with medication abortions include hemorrhaging and septic shock, both of which could have led the Legislature to require stretcher access to patients inside abortion clinics. Lack of stretcher access was one of the factors that the Gosnell grand jury found to have caused death in the Gosnell clinic. Gosnell Grand Jury Report, at 215. For that reason, HB2 satisfies the rational-basis prong of the inquiry, *Lee Optical*, 348 U.S. at 488-89, and thus satisfies the Constitution.

D. The admitting-privilege requirements do not violate the Constitution.

With regard to the abortion industry's attempt to re-litigate HB2's admitting-privilege requirements, this Court should reject Providers' claims because the admitting-privilege requirements rationally relate to public health. As the Eighth Circuit recognized, a similar Missouri law "furthers important state health objectives" by "ensur[ing] both that a physician will have the authority to admit his patient into a hospital whose resources and facilities are familiar to him and that the patient will gain immediate access to secondary or tertiary care." *Women's Health Ctr. of West Cnty., Inc. v. Webster*, 871 F.2d 1377, 1381 (8th

Cir. 1989). Notwithstanding its current litigation position, the federal government agrees. 42 C.F.R. §416.41(b) (mandating either a written transfer agreement or admitting privileges with a local hospital for ASCs under Medicare); 47 Fed. Reg. 34,082, 34,086 (1982) (mandate "ensure[s] that patients have immediate access to needed emergency or medical treatment in a hospital"). Perhaps most damning, though, is the abortion industry's recent advocacy for having doctors who "'[i]n the case of emergency' can 'admit patients to a nearby hospital (no more than 20 minutes away).'" *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 595 (5th Cir. 2014) (*quoting* National Abortion Federation, Having an Abortion? Your Guide to Good Care (2000)). While the industry may have disavowed its recent guidance, that about face is not the same thing as negating the *theoretical connection* between HB2 and Texas's objective, *Clover Leaf Creamery*, 449 U.S. at 463-64, which is Providers' evidentiary burden. As with the ASC requirements, these requirements are reasonably intended to protect the public health, and this Court has no basis on which to reject that goal.

Indeed, to the contrary, Providers have in essence admitted that HB2 does not violate the rational-basis test by affirmatively *relying on* 25 Tex. Admin. Code §139.56 to defeat HB2. Providers Br. at 8-9. By way of background, §139.56(a) requires abortion facilities to "ensure that the physicians who practice at the facility have admitting privileges or have a working arrangement with a physician(s) who has admitting privileges at a local hospital in order to ensure the

necessary back up for medical complications." If HB2 has no rational relationship – indeed, no "*theoretical* connection" – with women's safety, then neither does §139.56. Unlike strict scrutiny, the rational-basis test does not require narrow tailoring, and legislatures are free to tackle one aspect of a regulatory concern, without addressing all others. *Lee Optical*, 348 U.S. at 489 ("the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind"); *Murgia*, 427 U.S. at 315-17. Far from proving the lack of a rational basis between safety and admitting privileges, Providers have relied on the connection between the two by relying on the safety that §139.56 provides.

E. HB2's severability clause precludes the statewide relief that Providers seek.

Although they did not seek statewide relief for HB2's admitting-privilege requirements, Providers defend the District Court's facial invalidation of HB2. Providers' Br. at 54-55. While that relief is wholly inconsistent with Providers' prior *loss* to Texas in the first facial challenge, *see* Texas Br. at 17-19, it also would be indefensible under HB2's severability clause because "[s]everability is of course a matter of state law." *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996). This Court should forcefully reject the District Court's observation that it "plainly cannot be" that a state severability clause could "preclude a facial challenge to the act under existing abortion-regulation jurisprudence" and thereby "purport to act to abrogate the rights guaranteed by the United States Constitution." Pet. App. 152a. The District Court's

reasoning suffers from both a *non sequitur* in logic and a lack of jurisdiction.

First, limiting the scope of a challenge to exclude valid applications of HB2 does not abrogate any federal rights. It simply withdraws the ability of plaintiffs with *some* valid claims to obtain an overbroad remedy that would prohibit some conduct that *does not violate any federal rights*. When statutes contain facially invalid provisions, the "statute may forthwith be declared invalid to the extent that it reaches too far, but otherwise left intact." *Brockett v. Spokane Arcades*, 472 U.S. 491, 504 (1985). Insofar as a federal court's authority over a non-consenting state extends only to ongoing *violations* of federal law, *Green v. Mansour*, 474 U.S. 64, 66-67 (1985), HB2's severability clause cannot abrogate any federal rights. Quite simply, even if some aspect of HB2 imposed an impermissible burden in some geographic parts of Texas, that – by definition – would not pose a burden in the other geographic parts of Texas, which HB2's severability clause would remove from whatever part of the state experienced the constitutional violation.

Second, there simply is no right to facial challenges, much less to overbroad facial challenges. Instead, "as-applied challenges are the basic building blocks of constitutional adjudication." *Gonzales*, 550 U.S. at 168 (interior and alterations omitted). Where a representative plaintiff's claims are sufficiently common with the claims of a class of plaintiffs, Rule 23 allows class actions, FED. R. CIV. P. 23(a), but defendants have the due-process opportunity to help define an appropriate class based *inter alia* on the commonality of the alleged injuries. *Wal-Mart Stores*,

Inc. v. Dukes, 131 S. Ct. 2541, 2550-51 (2011). Outside of these general principles of federal litigation, state law does indeed define the contours of civil-rights cases under 42 U.S.C. §1983. *See* 42 U.S.C. §1988(a).[14] Under §1988(a), in the absence of controlling federal law, federal courts apply "state common law, as modified and changed by the constitution and statutes of the forum state." *Wilson v. Garcia*, 471 U.S. 261, 267 (1985) (internal quotations omitted). It is not inconsistent with federal law to prohibit overbroad remedies; similarly, it is not inconsistent with federal law to require plaintiffs to resort either to the "basic building block" of as-applied challenges or to class actions under the Federal rules. By contrast, it would be inconsistent with federal law to allow Providers to purport to represent a statewide class of women via a facial challenge in federal court where well over ninety percent of the class suffers no cognizable injury whatsoever.

III. PROVIDERS LACK THIRD-PARTY STANDING TO ASSERT THE *ROE-CASEY* RIGHTS OF FUTURE ABORTION PATIENTS.

Although Texas does not raise the issue, the Court should hold that Providers lack third-party standing to assert *future* patients' *Roe-Casey* rights.[15] Instead,

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[14] The "Title 24" in §1988(a) includes §1983. *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 544 n.7 (1972).

[15] The circuits are split on whether prudential limits on justiciability – such as third-party standing – are waivable, *compare Bd. of Miss. Levee Comm'rs v. EPA*, 674 F.3d 409, 417-18 (5th Cir. 2012)*with Animal Legal Defense Fund, Inc. v. Espy*, 29 F.3d 720, 723 n.2 (D.C. Cir. 1994), and it is not clear that

to the extent that Providers have standing, they must sue under their own rights, which implicate a lower standard of review.

While *Amici* do not dispute that physicians have close relationships with their regular patients, the same is simply not true for hypothetical relationships between Providers and their *future* patients who may seek abortions at Providers' clinics: an *"existing* attorney-client relationship is, of course, quite distinct from the *hypothetical* attorney-client relationship posited here." *Kowalski*, 543 U.S. at 131 (emphasis in original). Women do not have regular, ongoing, physician-patient relationships with abortion doctors in abortion clinics.

Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S.Ct. 1377, 1386-88 (2014), resolved that split. *Lexmark* concerned the jurisdictional versus prudential status of the zone-of-interest test applied to whether a party had a statutory cause of action. *Id.* That does not preclude a jurisdictional nature for third-party or *jus tertii* standing. Even if waiver applied to *the parties*, however, that would not limit *this Court's* authority to raise prudential limits *sua sponte*: "even in a case raising only prudential concerns, the question ... may be considered on a court's own motion." *Nat'l Park Hospitality Ass'n v. DOI*, 538 U.S. 803, 808 (2003). Simply put, on questions of *judicial* restraint, the parties cannot bind the judiciary: "To the extent that questions ... involve the exercise of judicial restraint from unnecessary decision of constitutional issues, the Court must determine whether to exercise that restraint and cannot be bound by the wishes of the parties." *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974). Indeed, simple logic dictates that judges can enforce *judge-made* prudential limits on justiciability, regardless of the parties' positions. Otherwise, judges could never adopt a new prudential limit without simultaneously rejecting it as having been waived.

Before *Kowalski* was decided in 2004, "the general state of third party standing law" was "not entirely clear," *Am. Immigration Lawyers Ass'n v. Reno*, 199 F.3d 1352, 1362 (D.C. Cir. 2000), and "in need of what may charitably be called clarification." *Miller v. Albright*, 523 U.S. 420, 455 n.1 (1998) (Scalia, J., concurring). Since *Kowalski* was decided in 2004, however, hypothetical future relationships can no longer support third-party standing. As such, Providers lack third-party standing to assert *Roe-Casey* rights. Providers' invocation of third-party standing also fails for two reasons beyond the limits that *Kowalski* put on using hypothetical future relationships to prove third-party standing.

First, Providers' challenge to HB2 would void legislation that Texas enacted to protect women from abortion-industry practices, a conflict of interest that strains the closeness of the relationship. Third-party standing is even less appropriate when – far from the required "identity of interests"[16] – the putative third-party plaintiff's interests are *adverse* or even *potentially adverse* to the third-party rights holder's interests. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15 (2004) (rejecting third-party standing

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[16] *See, e.g., Lepelletier v. FDIC*, 164 F.3d 37, 44 (D.C. Cir. 1999) ("there must be an identity of interests between the parties such that the plaintiff will act as an effective advocate of the third party's interests"); *Pa. Psychiatric Soc'y v. Green Spring Health Servs.*, 280 F.3d 278, 288 (3d Cir. 2002) (asking whether "the third party ... shares an identity of interests with the plaintiff"); *Region 8 Forest Serv. Timber Purchasers Council v. Alcock*, 993 F.2d 800, 810 (11th Cir. 1993) ("relationship between the party asserting the right and the third party has been characterized by a strong identity of interests").

where interests "are not parallel and, indeed, are potentially in conflict"). In such cases, courts should avoid "the adjudication of rights which [the rights holders] not before the Court may not wish to assert." *Newdow*, 542 U.S. at 15 n.7. Under *Newdow*, abortion providers cannot ground their standing on the third-party rights of their hypothetical future potential women patients, when the goal of Providers' lawsuit is to enjoin Texas from protecting those very same women from abortion providers' substandard care.

Second, the instances where this Court has found standing for abortion doctors involve laws that apply equally to *all abortions* and to *all abortion doctors*, so that the required "identity of interests" was present between the women patients who would receive the abortions and the physicians who would perform the abortions. Here, by contrast, Texas regulates in the interest of pregnant women who contemplate abortions and imposes no pertinent restrictions either on hospital-based and ASC-based abortions or on abortion doctors who already have (or are willing to obtain) admitting privileges. When a state relies on its interest in unborn life to insert itself into the doctor-patient relationship by regulating all abortions, doctors and patients potentially may have sufficiently aligned interests. Here, by contrast, all abortion doctors do not share the same interests as future abortion patients. Indeed, Providers do not share the same interests as all abortion doctors. Without an identity of interests between Providers and future

abortion patients, the doctor-patient relationship is not close enough for third-party standing.[17]

When a party – like Providers here – does not possess an absentee's right to litigate under an elevated scrutiny such as the *Casey* undue-burden test, that party potentially may assert its own rights, albeit without the elevated scrutiny that applies to the absent third parties' rights:

> Clearly MHDC has met the constitutional requirements, and it therefore has standing to assert its own rights. Foremost among them is MHDC's right to be free of arbitrary or irrational zoning actions. But the heart of this litigation has never been the claim that the Village's decision fails the generous *Euclid* test, recently reaffirmed in *Belle Terre*. Instead it has been the claim that the Village's refusal to rezone discriminates against racial minorities in violation of the Fourteenth Amendment. As a corporation, [Metropolitan Housing Development Corporation] has no racial identity and cannot be the direct target of the petitioners' alleged discrimination. In

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[17] The abortion industry sometimes cites Richard H. Fallon, Jr., *"As-Applied and Facial Challenges and Third-Party Standing,"* 113 HARV. L. REV. 1321 (2000) to support third-party standing. To the contrary, the law review article recognizes that its exceptions to third-party standing arise in First Amendment "overbreadth" cases and instances when *state-court appeals* reach the U.S. Supreme Court. *Id.* at 1359-60 & n.196; *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999). Those circumstances are obviously not present in an abortion case initiated in federal court.

> the ordinary case, a party is denied standing to assert the rights of third persons.

Village of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 263 (1977) (citations omitted); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 438 (1983) ("lines drawn ... must be reasonable"). Like the development corporation in *Arlington Heights*, Providers would need to proceed under the rational-basis test if they were to proceed without the elevated scrutiny afforded to third-party rights holders. Thus, depending on the resolution of the third-party standing issue, this Court might not need to apply *Casey* at all.

CONCLUSION

For the foregoing reasons, this Court should affirm the Fifth Circuit.

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Respectfully submitted,

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